THE USE OF THE PARDONING POWER

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The phrase "abuse of the pardoning power" is an untechnical vernacular expression frequently used by newspaper writers in criticizing an act of executive clemency. The words import condemnation for improper if not dishonest action by an executive in respect to either a particular case or group of cases or general official policy. That presidents and governors have pardoned those who should not have been liberated is admitted, for the purely human factor cannot be eliminated. Human institutions will always lack perfection because they must be administered by imperfect human hands. While perhaps caprice and immoderate compassion have at times prompted unwise action there is no notable case of corrupt use of the power during recent years. The cases that have called forth seemingly justifiable popular disapproval have generally been those in which the executive has erred through misconception of grounds or because of deception practiced upon him. Exercise of the power is the most difficult of the executive and perhaps of all governmental functions. Its very nature invites or at least affords ready opportunity for the most unreasonable invective, calumny and innuendo. This is mainly because of the broad nature of the jurisdiction, the impossibility of review and, especially, because of the superficial knowledge of the subject among laymen and the meager special study given it by even the bench and the bar. The fundamental and important truth is that clemency is a distinct jurisdiction which is far removed from that of the courts. This is commonly overlooked or not sufficiently considered. The American theory of democratic government is now, and was at the outset, stamped with the recognition of the people as the source of all power and the delegation of that power with proper restrictions to clearly separated legislative, judicial and executive departments. The executive department is clothed with all the discretion of the people as a collective sovereign otherwise undelegated and is the least restrained of all the branches. No man or other branch of government can supervise, direct or review an executive's

actions, he is not subject to mandamus, injunction, *certiorari*, writ of prohibition or even subpoena in respect to his official conduct.[1] In this vast reservoir of discretionary power the federal and several state constitutions have expressly placed the prerogative of clemency—in some instances with restrictions, in others without limitation. It is significant that it has never been overlooked in any scheme of government since the dawn of history. It is born of the realization that human institutions administered by human agencies must always have a *residuum* of imperfection; that tradition has been as universal and constant as the most basic of nature's laws and as little modified by the vicissitudes of governments. In this country while the people have delegated their legislative power to assemblies and deposited a general corrective force in the courts, in matters pertaining to the life and liberty of citizens, they have conferred an additional power and laid a specific command upon the executive, intended to be used and obeyed despite and above the law, the legislature and the judges. It is the self imposed check and cautionary protest of the multitude against unanticipated and cruel consequences of governmental deficiencies. It is now conceded under American constitutions that an application for clemency is of legal right, whether based upon a claim of innocence or excessive punishment, and that a moral duty is imposed upon the executive to afford relief if a rational interpretation of all the data marks the case as entitled to remedy by the higher justice. It is not a question of guilt or innocence alone. Every circumstance pertaining to the event and the individual is relevant in *foro clementiae* which is untrammeled by rules of court procedure, legal maxims and evidential formalities belonging to the judicial branch of the government.

Practically all the state constitutions in substance contain the clause: "The supreme executive power shall be vested in the governor, who shall take care that the laws are faithfully executed."[2] Among his unenumerated "supreme executive" powers is that of clemency, which requires him to relieve from the regular operation of the laws those whom he may deem, in his wise and merciful discretion, the people intended should be exempt from the application of a particular law or the consequences of the rigid procedure of courts. He can no more honestly withhold a pardon in a proper

[1] *Opinion of Justices*, 120 Mass., 600; Hartranft App., 85 Pa., St. Rep. 433.
[2] Const. Pa., art. iv, sec. 2.

case than he can refuse to call out the militia when the preservation of public peace demands it. His oath to "take care that the laws are faithfully executed" includes the declaration that he will maintain the constitution which confers upon him the pardoning power. Every law involving the restraint of individual liberty or forfeiture of property as a penalty for crime is passed subject to the constitutional provision concerning clemency which must therefore be considered a part of the enactment.

The exercise of this discretionary, exceptional and unreviewable jurisdiction undoubtedly presents grave difficulties. The unhampered and uncontrollable nature of the power, its emanation direct from the people whose best general sentiment it should always reflect, the lack of formality in its procedure and its general effects upon society and individuals make the lot of its depositary no enviable one. This is especially so in states having the "one-man power." It is now generally conceded that some advisory body should hear applications and make recommendations to the executive before he acts, thus securing regularity, publicity and careful consideration.

Whether the power be vested in one or many, however, the governing principles, as well as the source and nature of data that should control, are matters of highest importance, quite frequently misconceived by the executive and generally not appreciated by the public. Every depositary of the power should remember that it is intended to be a supreme and plenary supplement to the inadequacies and imperfections of ordinary governmental procedure so far as it affects individual liberty. On the other hand, he should firmly determine to exercise it only when in obedience to a rational interpretation of common public sentiment the case by reason of inherent special circumstances raises a persuasive presumption that it was intended by the people to be excepted out of the general terms of the punishing statute.

There is no doubt that decision is capable of being rendered upon precise and unassailable grounds, since clemency is a definite jurisdiction with guiding rules productive of rational and just results from all standpoints.

When the executive has gathered all the data pertaining to the offender, the violated statute, the offense, the trial and the punishment, the important question arises whether the case calls for relief. If it is one that a dispassionate mind of honest intent is constrained

to believe would not have been included in the terms of the violated statute when it was enacted had the legislature known the facts or been imbued with later accepted views, then it is exceptional, and clemency should be extended so far as the exceptionality warrants.

In matters touching public policy, dealing with youthful offenders, habitual criminals, rehabilitation of "occasional" culprits, etc., the common experiences of life and the generally accepted views on criminology will not only justify action but frequently represent general public sentiment in advance of its being enacted into laws.

It is under this phase of the extraordinary jurisdiction that criticism is just now particularly noticeable. The whole country is engaged in reconciling the old and new theories concerning crime and criminals. It cannot be doubted that depositaries of the pardoning power have been very much affected by the revolution which for thirty years past has been remoulding the whole body of criminal law and awakening the social conscience to a new sense of responsibility for the existence of crime and the necessity of securing more adequate protection against malefactors. It has now culminated in the overthrow of that primitive and purely instinctive system which for some five thousand years was tried and found to be ineffectual. There is a general acceptance of the theories of criminology and penology which have been evolved by and proven to be consistent with the moral and intellectual advancement manifested in all other phases of community life.

The fallacy of the traditional vindictive punishment of criminals is recognized, the belief in its deterrent effect is exploded and the attempt to diminish crime by statutes fixing a definite penalty for a specified offence is admitted to be futile. Formerly, the symptoms of social distemper were never studied with a view to learning and eradicating the causes. Now, however, the doctrine is generally accepted throughout the civilized world that infliction of pain should be eliminated from criminal law as unnecessary and unwarranted and that criminals, being morally defective, are wards of the state, to be cared for in order to reform them if possible and in any event to prevent their becoming a menace to society. All of this is being widely and earnestly applied under the admonition: *Study the criminal rather than the crime.*

There remain, however, many constitutional and statutory evidences of the old theory, indicating that the present time is one of

transition. It is shown by the fact that Congress and legislatures still endeavor to create virtue and honesty by positive law while almost in the same hour they enact statutes based upon the individual study and treatment of malefactors irrespective of their offences, and create commissions to inquire whether certain industrial conditions or social relations tend to either physical impairment or moral degeneration.

The depositaries of the pardoning power have not escaped the influences of this general revolution. Until the laws are changed, the people can look for action consistent with modern ideas only to those who hold the great exceptional jurisdiction. None should shrink from exercising the pardoning power in furtherance of what is now a general public sentiment which promises much for the individual and for society. Only in this way can the will of the people be fulfilled and their good be promoted during the period of adjustment by legislative enactment. If the power of pardon is being abused today it is in the failure of executives to act upon their own motion and apply the rational theories of criminology to the many prisoners throughout the country who were years ago incarcerated under the system of rigid impersonal and mechanical criminal laws. An intelligent investigation would reveal that many inmates of prisons could and ought to be set free because able and disposed to take up their primary duties of contributing to the common weal and behaving with due regard to the rights of others. So, too, many might be discovered who would always be a menace to society and thus data be secured for recommending proper protective laws before their liberation. In any event there would be the opportunity for study of the criminal and for adopting such remedies as would tend to diminish crime.

No executive is bound to wait until an application for pardon is presented to him. His constitutional duty is to exercise his power rationally in all exceptional cases, for the state needs the coöperation of every normal citizen in the community life. In some states through penitentiary officials this work is already going on and in others the governors have had special investigations made and have liberated many prisoners.

There have been many instances when executives have felt impelled to utilize the untrammeled jurisdiction of clemency for applying these rational principles of criminology which by the slower

methods of legislation will in time be entrusted to the ordinary channels of the judicial branch of government. It cannot be done in a day, a year, nor in some states even in a decade, but it will be accomplished. The readjustment is going steadily forward and there is little doubt that in the near future the people of this great nation will at last fully emerge from the cloud of antiquity, discard the old cruel, useless and futile criminal laws and procedure and adopt sane, humane and rational measures for the protection of society from its defective members and provide for their proper care and reformation. Then every crime, when its perpetrator is discovered, will mean special study and treatment of the culprit according to enlightened methods and ends, and the pardoning power will change from an active function into an interesting historical tradition.